("SDBs"). Still, an SDB's opportunity to acquire more stations is meaningless if consolidation leaves the SDB with nothing to buy and without the ability to compete. Therefore, the earmark of a deregulatory plan should be careful, thoughtful implementation, as described in our Initial Comments[42/] and as amplified below.

A. Staged Implementation, As Proposed By The Diversity And Competition Supporters And By Paxson Communications, Provides The Best Hope For Protecting Diversity, Competition, Localism And Minority Ownership

A central point of our comments was that the Commission should focus not only on whether to deregulate, but, *if* it deregulates, to *go* about it in carefully measured stages, retaining the ability to apply the brakes if diversity, competition, localism or minority ownership are endangered. We supplied examples of how such a Staged Implementation Plan might operate in practice.[43/] Naturally, we were delighted that another party independently made exactly the same point:

> the Commission's ownership rules have been the fundamental reality of the broadcast industry and the rules have shaped the businesses and plans of every industry participant. It would be unwise to rashly discard any of the existing ownership rules or to attempt to replace them with an as yet undetermined single ownership rule based on an as yet unexplained market/voice standard. [44/]

Paxson urged immediately increasing the national cap to 50%, but:

42/ *Id.*, pp. 82-101.

43/ *Id.*, p. 84 (Figures 1 and 2).

44/ Paxson Communications Comments, p. 6.

> Paxson believes that the wisest course is to liberalize the current rule at a pace that allows for all existing station combinations, but preserves the Commission's flexibility to exercise some control if increasing consolidation begins to have ill effects. 45/

While maintaining that "[s]uch ill effects are unlikely" Paxson urged that:

> the Commission should immediately increase the ownership cap to 50%, which will accommodate all existing broadcast combinations and give some additional room for growth. The Commission should also establish a presumption that it will increase the cap by at least 2.5% on a biennial basis until the cap reaches 60%. As part of each biennial review proceeding, the Commission should evaluate developments in the television broadcast and greater media markets and determine whether it should increase the cap more quickly or slowly. Once the cap reaches 60%, the Commission should continue to monitor conditions in the broadcast industry, but without a presumption that additional relaxation of the cap will occur. If conditions remain as strongly competitive as they are now, further relaxation may be in order. 46/

Paxson's deregulation schedule and our plan[47/] are compared below.

Figure 1: National Coverage-Based Deregulation Plans

Stage	Year	Paxson Communications Plan	Diversity & Competition Supporters Plan
0	Current	35.0%	35.0%
1	2003	50.0%	36.0%
2	2005	52.5%	37.0%
3	2007	55.0%	38.0%
4	2009	57.5%	39.0%
5	2011	60.0%	40.0%

Certainly, Paxson contemplates much faster deregulation than we believe would be prudent -- particularly with its proposal for

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45/ Id., p. 14.

46/ Id.

47/ See Initial comments, p. 84.

an immediate and dramatic leap to 50% national coverage. Indeed, we would much prefer no deregulation of the national cap at all. But conceptually, Paxson has the process right, and the company deserves credit for putting the good of the country above its own short-term private interest.

Staged implementation is profoundly sensible, as the Commission's history48/ and the nation's history have illustrated.49/ The continued economic health of the industry

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48/ Parallels for staged implementation abound. For example, ILECs' entry into the long distance market is conditioned on their completion of a fourteen-step checklist. Analog television service will go away only after an 85% DTV service level is attained. Imagine the consequences if the Commission had been told in 1996 to immediately open the doors to unlimited ILEC entry into long distance, or if the Commission had been told to abandon analog service as soon as the first DTV station signs on the air.

49/ It would be repugnant to equate media structural deregulation with school integration as a public good; at best, only some aspects of media structural deregulation might benefit the public, while virtually everything about school integration benefitted the public. Still, the history of school integration sheds light on the value of staged implementation. In 1954, the Supreme Court declared that in the public schools, "separate" was inherently "unequal." Brown v. Board of Education, 347 U.S. 483, 494 (1954) ("Brown I"). Massive resistance immediately arose. Difficulties with implementation were invoked, usually as pretexts for inaction. For example, it suddenly became a priority to rehabilitate the physical structures in which millions of Black children were educated, since White parents would not allow their children to be sent to these dilapidated institutions. Black teachers had to be fired, Black principals had to be demoted, and White teachers had to be trained to teach in an integrated setting. Private "segregation academies" had to be funded and constructed. Citing some of this, the Court in 1955 directed that desegregation must proceed "with all deliberate speed." Brown v. Board of Education, 349 U.S. 294, 299 (1955) ("Brown 11"). Inevitably, that command was misread by segregationists to mean "all deliberate absence of speed." In 1968, the Court made it clear that Brown II required whatever steps were necessary to convert a dual-school system into a "unitary system in which racial discrimination would be eliminated root and branch" through

[n. 49 continued on p. 28]

cannot be maintained if deregulation is implemented too suddenly. A seismic shock to the system would produce dangerous side effects that Congress expects the agency to avoid. Small businesses are particularly vulnerable to the economic consequences of sudden changes in settled expectations. They do not have huge staffs of MBAs available to recraft established business plans, or to craft alternate plans that take into account every potential disruptive regulatory event. Lacking vertical or horizontal integration, they cannot sail along on several economic engines, confident that if one engine develops trouble, the ship can still plow ahead.

What is contemplated in this proceeding is major surgery, and a good surgeon follows the Hippocratic Oath to "do no harm." She monitors her patient's health, and works in several stages over time when undertaking a potentially dangerous operation. Likewise, the Commission should monitor the market's health and

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[continued from p. 27]

plans that promise "meaningful and immediate progress toward disestablishing state-imposed segregation." Green v. County School Board of New Kent County, 391 U.S. 430, 437-48 (1968) ("Green"). Thereafter, desegregation proceeded under the supervision of federal district judges using a form of staged implementation based upon six "Green factors," including pupil placement, faculty placement, and equalization of facilities. These staged implementation plans gave school districts the flexibility to address genuine concerns (budgets, training, teacher recruitment and new school construction) over reasonable periods of time, while giving no credence to pretexts flowing from a desire to maintain segregation. A school district's equalization of each of the Green factors would signal the end of discrimination as a cause of segregation. A federal judge could then declare that a district had attained "unitary status," whereupon court supervision would end. To say the least, this process was flawed, but things would have been much worse if "all deliberate absence of speed" had remained the rule instead of the staged implementation approach mandated by Green.

proceed in several stages over time while performing potentially dangerous surgery on the media industry.[50/]

Staged implementation is consistent with Section 202(h) of the Telecommunications Act. In our Initial Comments, we stated:

> As codified at 47 U.S.C. §161, this provision requires the Commission to review, biennially, regulations such as those being considered in this proceeding. It directs that the Commission "shall determine whether any such regulation is no longer necessary in the public interest as a result of meaningful economic competition" and it instructs the Commission to "repeal or modify any regulation it determines to be no longer necessary in the public interest." ....
>
> First, as we have presented it, the Staged Implementation Plan paradigm would enable the Commission, upon the issuance on its 2003 Omnibus First R&O, to effectuate the First Stage immediately. Thus, if the words "repeal or modify" are read to imply action that begins immediately, the Staged Implementation Plan would satisfy that requirement.
>
> Second, if a rule is found not "necessary in the public" or "no longer in the public interest," and the Commission reads that language to mean it must "repeal or modify" the rule, nothing in the words "repeal or modify" (particularly the more moderate term "modify") suggests that the Commission's deregulatory action must occur all at once. The statute is silent on this question, thereby implicitly leaving it to the Commission's routine discretion on how to craft the remedy. On that subject, the Commission's discretion is very broad.
>
> At most, then, Congress has said that if the agency finds it no longer "necessary" for the rules to remain in one place, the Commission must choose a better destination, point its public interest vehicle in that direction, and drive it there. Section 202(h) does not disallow the Commission from observing the road and being ready to apply the brakes promptly if danger is observed. Specifically, the Commission is permitted -- indeed, it is expected -- to conduct further biennial reviews to determine whether further "modifications" are needed. Such biennial reviews are designed in to our model of a Staged Implementation Plan.

50/ *See* Initial Comments, pp. 92-93 (describing the potentially disruptive impact of too-sudden deregulation on media markets, and noting that the resulting speculation and uncertainty could endanger the industry's economic health.)

> Consequently, a Staged Implementation Plan could be fully consistent with Section 202(h), irrespective of how the Commission defines the terms "necessary in the public interest" and "no longer in the public interest." 51/

Paxson agrees that staged implementation is consistent with Section 202(h):

> because it would embody the Commission's judgment that the current cap is not necessary in the public interest, but that immediately eliminating any cap also is not in the public interest. For the last 60 years, broadcasters have calibrated their business activity against the background of national ownership limitations. They should now be given the opportunity to adjust those plans over time to accommodate the potential changes that unlimited national ownership could bring. Moreover, there are enough potential dangers in relaxing the cap to justify a go-slow approach. Paxson reiterates that it expects increases in the cap to have no ill effects on diversity, competition, or localism. Section 202(h) does not, however, require the Commission to ignore concerns about possible market distortions that could be caused by increased consolidation simply because it cannot demonstrate with certainty that those effects will occur. The course Paxson proposes steers a middle course that is firmly deregulatory, but that will leave the Commission with options if market distortions occur (fn. omitted). 52/

We are confident that Section 202(h) does not preclude, and indeed affirmatively contemplates staged implementation. Staged implementation is contemplated by Section 202(h)'s use of the words "repeal or modify." "Modify," in this context, is a nonsuperfluous word. There are three ways one can "modify" something by way of reducing it: one can relax it immediately, one can relax it over time, or one can phase it out over time. There is no indication that Congress intended the Commission to suspend its good judgment, or ignore the fruits of its own expertise, on the question of whether the instantaneous imposition

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51/ *Id.*, pp. 99-101 (fns. omitted).

52/ Paxson Communications Comments, pp. 14-15.

of seismic changes in the marketplace would do harm to the pro-competitive goals Congress sought to achieve in the 1996 legislation.

To be sure, in 2004-2005 the Commission would still need to conduct a Section 202(h) biennial review of those regulations that it does not schedule for relaxation or repeal in this proceeding. Furthermore, Section 202(h) could require the Commission to revisit its staged implementation schedule de novo every two years -- since that schedule would itself be a rule. However, that de novo review could occur coterminously with each stage of the Staged Implementation Plan, using the same metrics for diversity, competition, localism and minority ownership that the Commission would use in the Staged Implementation Plan. The new "Staged Implementation Rule" would be like any other rule affected by Section 202(h). The Commission would review the Staged Implementation Rule biennially, at which time the Commission would determine whether it is "necessary in the public interest" for the Commission to retain the ability to apply the brakes if unhealthy conditions manifest themselves in practice, and to resume deregulation once those conditions are corrected.

Such a Staged Implementation Rule, reflecting the Commission's desire to maintain the health of the marketplace, would be likely to pass any of the tests of "necessity" offered by the parties to this proceeding. Indeed, such a procedural rule should be regarded as indispensable, since it would implement Congress' expectation that the agency use its expertise to "modify" rather than just "repeal" a substantive regulation.

It follows, then, that there are no legal impediments to the adoption of staged implementation. The concept should be embraced as a model for compromise on the merits, as a method of preventing harm to markets and consumers, and as a template upon which initiatives that promote minority ownership can be impressed.

B. The Commission Should End "Flagging" And Expedite The Processing Of Assignment And Transfer Applications

The Bureau does a superb job of quickly processing non-flagged and uncontested assignment and transfer applications. Nonetheless, if the Commission adopts some deregulation, the Bureau could be deluged with Form 314 and Form 315 applications that present a host of questions of first impression. To avoid such a quagmire, the Commission should adopt bright-line rules, abandon flagging, and (to the extent humanly possibly) eschew case-by-case review of uncontested applications.

In the local radio ownership proceeding, MMTC explained why flagging is so disruptive to small businesses:

> Irrespective of the outcome, a flag generates unanticipated delay. For a small entrant, that delay can be crippling or fatal. Small entities that raise the capital for an acquisition often must encumber their other assets in order to secure the equity or debt needed to complete the acquisition. During the time the deal is pending, these other assets cannot be used as security for any other transactions. Cash in hand, pledged or escrowed, cannot be used productively. Nor can a small company buy something else while its deal is pending, as a large company could do.
>
> Thus, we agree with industry commenters who want the Commission to eliminate the screen. The screen was a good concept, but it suffered from the Commission's insufficient resources and consequent long delays. A bright line rule is preferable. 53/

53/ Reply Comments of MMTC in MM Docket No. 01-317 (Local Radio Ownership), May 8, 2002, p. 22.

Small businesses are especially in need of certitude and expedition in their dealings with the Commission. They seldom possess the capital reserves, staff, and multiple income streams sufficient to weather long regulatory delays. New entrants buying stations urgently need to be able to deliver to the seller, their investors, and their staffs a rapid grant of an uncontested application. Unlike a going concern, a new entrant has no other resources to sustain itself while it is waiting for a grant. It will have studio space leases, tower leases, and network affiliation contracts lined up -- the loss of any of which can kill a deal. Investors will be concerned about when they will begin to see income being generated. Often, the principals will have mortgaged their houses, and key staff have left their jobs to prepare for the acquisition. Investment or loan commitment terms may change, or investments and loans may disappear entirely.

These considerations also apply to incumbents, but they are potentially devastating to new entrants. Moreover, while a company's first deal, or one of its first deals, is pending, the company cannot compete for and may lose subsequent deals.

To cure this problem, the Commission should adopt bright-line standards, eliminate "flagging" and, to the extent possible, eschew case-by-case review. As Bonneville accurately contended, case-by-case review

> is indefinite and lacks the certainty required in the media marketplace to effectively plan financial transactions.... such an approach will necessarily result in a substantial drain on Commission resources, lengthy processing delays for applicants, and significant transaction costs as the marketplace will have no certainty regarding FCC treatment of potential transactions. 54/

D. The Commission Should Explore The Concept Of A Private Market For "Diversity Credits," Analogous To Pollution Credits But Without Their Anti-Consumer Attributes

We close with a new idea that we propound here for consideration and debate. We have no position on it, and are not prepared to offer it as a proposal. Instead, we offer it because it is at least theoretically capable of forming the basis for a market-based compromise that would satisfy the competing objectives of the parties while, at the same time, providing direct incentives for small and independent media outlets.

In the environmental field, the concept of "pollution credits" has taken hold. under this concept, in theory, a company would be required to avoid exceeding certain pollution thresholds. If it operates below that threshold, it receives a "pollution credit" which it can sell in the private marketplace to another

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54/ Comments of Bonneville International Corporation, filed January 2, 2003, p. 9. See also Comments of Clear Channel Communications, filed January 2, 2003, p. 8. n. 21 (offering several rather troubling examples of decisions that required several months and that applied inconsistent metrics among comparable applications).

company that did not meet that threshold.55/

This concept has not been without its critics, since if ineffectively applied it could retard the restoration of clean air. In the electronic media context, however, the Commission would be writing on a blank slate. Starting with the EPA's paradigm, the FCC could develop a system of marketplace incentives that could serve as a substitute for a good deal of structural regulation, while at the same time incentivizing diversity, including ownership by socially and economically disadvantaged businesses ("SDBs"). Here is how the concept could work:

1. SDBs would be given a certain number of Diversity Credits, commensurate with the extent of their social and economic disadvantages. 56/

55/ See Peter Behr and Eric Pianin, "Firms Start Trading Program for Greenhouse-Gas Emissions," Washington Post, January 17, 2003, p. A14 (reporting that the Chicago Climate Exchange, patterned after commodity exchanges, has been created by major corporations for "trades of credits earned by firms that exceed emission-reduction goals." Among the 14 initial members are DuPont Co., Ford Motor Co., Motorola Inc. and the City of Chicago. Each exchange member agrees to reduce average greenhouse-gas levels from 1998 to 2001 by four percent over the next four years, and "[c]ompanies that exceed reduction goals could sell excess reductions to other members that were falling behind their targets. The price would be set by bids on the exchange. Members that failed to meet the 4 percent target would be disciplined at that time by the exchange" and would face sanctions.

56/ This feature of a Diversity Credit plan is logically similar to the Commission's decision to award bidding credits to new entrants in auctions. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases (First R&O), 13 FCC Rcd 15920, 15993-15996, ¶¶186-190 (1998).

2. A pre-established number of Diversity Credits would be given by the Commission to the seller at the closing of a transaction that would result in greater structural diversity, including transactions in which the buyer is an SDB. The Commission would also award Diversity Credits to companies establishing incubators for SDBs. 57/

3. A pre-established number of Diversity Credits would be returned to the Commission by the buyer at the closing of a transaction that would result in additional consolidation.

4. Companies could buy or sell Diversity Credits to one other in private transactions. A private market for Diversity Credits would enhance the value of Diversity Credits, thereby benefitting those (like many SDBs) that do not participate in these inter-company transactions. This market in Diversity Credits would also permit a company that anticipates the need to complete a consolidation-producing transaction to bank enough Diversity Credits to allow it to rapidly complete the transaction when it occurs. If such a company needs more Diversity Credits, it could earn them by selling properties to or incubating SDBs (as noted above), or it could buy more of them from SDBs -- thereby providing the SDBs with additional capital.

Such an approach could have several advantages:

First, it would establish a voluntary market mechanism that incentives diversity and disincentivizes consolidation.

Second, it would immediately deliver to SDBs an asset convertible into capital, thereby helping solve the greatest single barrier to entry faced by SDBs.58/

57/ In principle, this feature of Diversity Credits would operate much like the tax deferral mechanism in Senator McCain's Telecommunications Ownership Diversification Act of 2003, S.____ (introduced January 30, 2003). Upon a qualified sale, the seller would receive a tangible reward.

58/ See, e.g., National Telecommunications and Information Administration, U.S. Department of Commerce, "Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States" (December, 2000) at 45-46 (describing the impact of minorities' lack of access to capital).

Third, it would incentivize sales of stations to SDBs, thereby creating new diversity-producing opportunities.

Fourth, it would help ameliorate SDBs' competitive disadvantages when they compete for opportunities at market-aggregation (—— creating clusters or crossownerships).

Fifth, it would reduce the need for regulatory oversight, including many bright line rules, flags being thrown, and waivers being sought and justified.

The Commission has authority to issue Diversity Credits under Section 303(f) of the Communications Act, which provides that the Commission may "[m]ake such regulations not inconsistent with law as it may deem necessary to...carry out the provisions of this Act",[59] and by Section 303)(g) of the Communications Act, which authorizes the Commission to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest[.]" Thus, the Commission could attach Diversity Credits to broadcast licenses.[60]

59/ See also Section 303(r) of the Communications Act, authorizing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.. .. Two "provisions of this Act" the Commission would "carry out" by awarding Diversity Credits are Sections 151 and 251. See discussion at p. 13 supra. Authority to award Diversity Credits is also available under Section 303(i), which authorizes the Commission to "make special regulations applicable to radio stations engaged in chain broadcasting[.]"

60/ This procedure also opens the door for the use of Diversity Credits to be removed from the license in the event of serious EEO violations, or to be added to the license when EEO recruitment and outreach efforts far exceed the minimum expected by the regulations.

We offer this concept in the hope that other parties will attempt to design a market-based Diversity Credit program that would serve the public interest and bring some measure of harmony and closure to this proceeding.

D. Section 202(h) Was A Mistake And The Commission Should Seek Its Repeal

Appearing on C-SPAN on January 27, 2003, Chairman Powell characterized the biennial review requirement in Section 202(h) as "destabilizing." He is correct. Reason #1 why Section 202(h) was a mistake is the devastating impact on small and disadvantaged firms of the two-year review cycle in the statute. Small firms, particularly new entrants, depend upon institutional investors who do not operate in two-year cycles. Investors expect from new entrants a five-year cycle of purchase, return, and trade-up, grounded in reliable assumptions that regulatory conditions will not unexpectedly change to their detriment. Those investing in new entrants are unavoidably risk-averse, and their risk-aversion is heightened when regulatory conditions are unpredictable. Thus, the two-year review cycle in Section 202(h) imposes an additional cost of capital on new entrants and those who invest in them, further exacerbating the well-known access-to-capital impediments facing small and especially minority entrepreneurs.[61/]

Reason #2 to repeal Section 202(h) is that the Commission depends on the public interest and civil rights communities for balance in developing a full record in structural rulemakings. Nonprofit organizations seldom possess the resources to match the

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61/ *See* p. 36 n. 58 *supra*.

corporate world as equals in these proceedings, and they certainly lack the strength to endure another of these proceedings in 2004-2005, 2006-2007, 2008-2009, and beyond.

Reason #3 is obvious: how can anyone know if a structural regulation has served its purpose in just two years?

We have presented a Staged Implementation Plan which comports with Section 202(h).[62/] That plan, if adopted, would cure some of the problem of permanentized rule review seemingly contemplated by Section 202(h). Nonetheless, Section 202(h) would require the Commission to review, again in 2004-2005 and *ad infinitum*, those rules *not* relaxed this year. What possible public purpose is served by this?

There is nothing wrong with periodic and systemic review of Commission regulations, and the Commission should commit itself to undertaking such review upon reasonable intervals. Nonetheless, the Commission should not hesitate to include in its legislative recommendations a proposal that Congress repeal Section 202(h).

62/ *See* pp. 99-101 *supra*.

Conclusion

Most of the initial comments staked out polar opposite positions. No one should be faulted for that, given the time constraints relative to the magnitude of the task. But certainly the time will soon arrive for consensus-building. All stakeholders ought to focus in the weeks ahead on the greater good, and on the moral values that the industry stands for.

The Commission is certainly hearing from parties who are coming in, one by one, to present their views. It might also be a good idea for the Commission's staff (or for individual commissioners) to invite small groups of opposing parties to visit simultaneously -- not to debate, but to think collegially about whether common ground exists for the achievement of some of their reasonable objectives.

Respectfully submitted,[63/]

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